APPENDIX A

Nos. 13896-7-8

United States Court of Appeals

FOR THE SIXTH CIRCUIT

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, an unincorporated labor organization, et al., *Appellants*,

v.

THE HUMKO COMPANY, INC. (A Division of National Dairy Products Corporation), *Appellee*.

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, an unincorporated labor organization, et al., *Appellants*,

v.

RALPH KENT PHILLIPY, et al., *Appellee*.

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, an unincorporated labor organization, et al., *Appellants*,

v.

KUHNE-SIMMONS COMPANY, INC., An Illinois Corporation, *Appellee*.

APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided February 15, 1961.

Before MCALLISTER, Chief Judge; POPE, Circuit Judge, and THORNTON, District Judge.

THORNTON, District Judge. This is an appeal from three judgments entered by the District Court in three cases consolidated by the Court and tried to the Court. Plaintiff HumKo Company, Inc., hereinafter called "HumKo" recovered a judgment in the amount of $57,013.05. Plaintiff Ralph Kent Phillipy, et al., hereinafter called "Phillipy" recovered a judgment in the amount of $11,264.73. Plaintiff Kuhne-Simmons Company, Inc., hereinafter called "Kuhne" recovered a judgment in the amount of $29,358.52. These judgments were recovered by each of these plaintiffs except HumKo against the same defendants, International Teamsters Local 984 of Memphis, Tennessee, and International Teamsters Union and certain agents and representatives of each, namely, R. A. Farrell as president of Local 984, and Francis J. Murtha as international or field representative of the International Union. HumKo's judgment was against International Teamsters Local 984 of Memphis, Tennessee, and International Teamsters Union. The complaints alleged violations of Section 303(a) of the Taft-Hartley Act, 29 U. S. C. A. § 187, which section prohibits secondary boycotts. (See Appendix, page 1, where this section of the statute is set forth in full.) Recovery of the damages sustained and of the costs of the suits was sought. The causes of action in the three suits were the same, except for the variations in the actual damage figures.

The appellants have submitted what they consider to be the proper questions for review on this appeal. The appel-

lees have submitted a counterstatement of what they consider to be properly before the Court on this appeal. The two sets of questions are not in accord. For the purpose of completeness in this opinion, we include the two statements above referred to in the appendix attached hereto. We here state, however, that we believe the questions as submitted by the appellants are so phrased as to result in the invasion of the province of this Court by predetermining that the findings of the Trial Court are clearly erroneous. After an analysis of a rather extensive record, we recognize the counterstatement of questions presented by appellees as being a proper statement of the matter before us for determination.

The District Judge made detailed findings of fact which we summarize:

SUMMARY OF THE FINDINGS OF FACT

The HumKo Company, Inc., a Tennessee corporation, was a division of National Dairies with its plant on Thomas Street in Memphis, Tennessee, where its normal business was the manufacturing, selling and distribution of edible fats and oils; D. R. Phillipy & Sons Company had its principal place of business at Memphis, Tennessee, and was a mechanical contracting firm; Kuhne-Simmons Company, Inc., was an Illinois corporation with its principal office located at Champaign, Illinois, and was engaged in the general construction business; Local Union 984, International Brotherhood of America was an unincorporated association organized and existing for the purpose, among other things, of representing employees in collective bargaining

with their employers. It maintained its office and place of business in Memphis, Tennessee, and did business regularly within the jurisdiction of the District Court. The defendant, R. A. Farrell, was a resident of Tennessee, was president and chief executive officer of Local 984; he was sued in his representative capacity; Local 984, as a labor organization, was subject to the Labor-Management Relations Act; the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America was an international labor union organized as an unincorporated association composed of subordinate affiliated local labor unions located throughout the United States, of which Local 984 was one. The International had its headquarters and principal place of business in Washington, D. C. It conducted business regularly within the jurisdiction of the District Court below, through its member, Local 984, and through its agent or representative, Francis J. Murtha, who was a resident of Memphis, Tennessee. Murtha was sued in his representative capacity only. The International was a labor organization subject to the Labor-Management Relations Act.

Murtha, on July 12, 1957, was an organizer for the International Union with his headquarters in Memphis, Tennessee, his duties covering ten southern states, including Tennessee. Such duties were general and were assigned to him by the president of the International or by someone else in authority. They were to make investigations, to assist in negotiations, to conduct elections, to manage trusteeships, to attend hearings, and to consult with officers of local unions with respect to organizing various groups of employees.

Murtha transacted business on behalf of the International in the Local 984 headquarters in Memphis, Tennessee, where he had a desk, use of the telephone and of secretarial service; Local 984 was, on July 12, 1957, the certified bargaining agent for the Production, Maintenance and Drivers hourly paid employees of the Thomas Street plant of HumKo. Farrell and Kuhns, as officers of Local 984, attended and participated in collective bargaining negotiations with officials and representatives of HumKo to secure a contract for the Production, Maintenance and Drivers hourly paid employees of the Thomas Street plant of HumKo. This took place before, during and after the period of picketing at Champaign, Illinois. Murtha attended and took an active part in several of these collective bargaining meetings with the officials of HumKo and the officers of Local 984. On one occasion at least, Murtha was the only representative participating in such collective bargaining negotiations with officials of HumKo. At all times during these negotiations and during the period Murtha was so engaged, his sole and only occupation was as International organizer. He was receiving his regular salary from the International. He received no form of payment from Local 984 for his services.

Only July 8, 1957, during the negotiations between Local 984 and HumKo, a picket line was placed at the Thomas Street plant of HumKo. On July 12, 1957, a labor dispute existed between HumKo and Local 984.

In the latter part of 1956, HumKo had entered into a contract with Phillipy and Kuhne, as independent contractors, for the construction of a plant to be known as the Mid-

west Refinery of HumKo at Champaign, Illinois, which is about 400 miles from Memphis, Tennessee. This plant, when completed, would produce edible fats and oils. On July 12, 1957, in furtherance of this contract, Phillipy and Kuhne were engaged in the construction of this plant, and no employees of HumKo did any work of any kind or nature on such construction. No employee or official of HumKo gave instructions or directions to any of the employees of Phillipy, Kuhne or to any other contractor or subcontractor engaged in this construction. On the 12th day of July, 1957, both Phillipy and Kuhne had many of their own employees working on this construction, all of whom were labor union members; Phillipy and Kuhne, as independent contractors, also had several subcontractors performing work and services on this job, and all such employees were also members of various labor union organizations. As of July 12, 1957, neither Phillipy nor Kuhne had any labor dispute with Local 984, nor with any other labor organization or union—local or international—and the same is true of every other contractor, subcontractor and/or employee working on the job as of that date.

The construction site of Midwest Refinery was wholly enclosed by a wire cyclone fence, and the entrance gate to the construction site was a wire cyclone gate on Mattis Road, where all of the employees of Phillipy and Kuhne, and the other contractors and subcontractors entered upon the construction site. On July 12, 1957, the construction of the Midwest Refinery was approximately 65-75% completed, but neither the possession of the whole plant, nor of any part of it, had been turned over to HumKo on this date; the only

employees of HumKo at the construction site were salaried, advisory and engineering employees.

There were no Production, Maintenance and Drivers hourly paid employees of HumKo at this construction site;

the machinery for the manufacturing of edible fats and oils was not yet installed at the HumKo plant at Champaign;

no raw materials for the manufacturing process of edible fats and oils were on the job site; and no edible fats and/or oils were being manufactured, sold or distributed at the Midwest Refinery of HumKo at Champaign.

All of these facts were known to the agents and officers of Local 984, and to the local agent of the International.

On July 11, 1957, an officer and agent of Local 984, accompanied by several striking HumKo employees, attended a meeting of business representatives of various unions at the meeting place of the Champaign Trades and Labor Council. This officer and agent requested them and their unions to instruct their members not to cross the picket line and not to do any work for their neutral contractor employers who were in the process of constructing the HumKo plant. He also told them that they would be very poor union members if they did not respect the picket line and that, notwithstanding any advice to the contrary, he was going to set up a picket line on the following morning. On the morning of July 12, 1957, pickets from Local 984, who had been brought from Memphis, Tennessee, by an officer of Local 984, formed a picket line at the entrance gate of the Midwest Refinery of HumKo at

Champaign. They carried placards bearing this legend: "Production, Maintenance and Driver Employees of The HumKo Co., Inc., Memphis, Tennessee, ON STRIKE for better wages & working conditions . . . Members of General Drivers, Salesmen and Warehousemen's Local Union No. 984, AFL." These pickets maintained said picket line continuously until the late afternoon of July 23, 1957. The purpose of the picket line was to stop construction work at the Midwest Refinery of HumKo, at Champaign. On July 12, 1957, the employees of Phillipy, Kuhne and of the other contractors and subcontractors engaged in this construction work appeared for work but none of these employees crossed the picket line on this date for the purpose of working on such construction, nor did they do so on any subsequent working day, during the time that the picket line was maintained. No construction work of any kind was done from the morning of July 12, 1957, until the morning of July 24, 1957, by any of the employees of Phillipy or Kuhne, or of any other contractors or subcontractors engaged in this project. These contractor employers on the job (who were secondary neutral employers) were thereby forced to cease doing business with HumKo.

On July 15, 1957, while a picket line was being maintained at the HumKo plant at Champaign, a collective bargaining meeting was had in Memphis, Tennessee, between Local 984 and officials of HumKo, at which it was stated, in substance, by a HumKo official, that further negotiations were being made more difficult because of the maintenance of the picket line at the HumKo plant at Champaign. Francis J. Murtha,

the International organizer, was present at the meeting when this statement was made, but he made no objection to, nor repudiation of such statement or fact, on behalf of the International. During the maintenance of the picket line at Champaign, Local 984 was assured by R. A. Farrell, its president (in a statement by him at a Local Union meeting) that the International was 100% behind the Local.

On July 15, 1957, Kuhne filed with the National Labor Relations Board at Chicago a complaint charging Local 984 with setting up and maintaining a picket line at the Midwest Refinery of HumKo at Champaign. It further charged that such picket line encouraged and induced the employees of Kuhne to engage in a strike or concerted refusal to work or perform services in the course of their employment, the object being to force Kuhne to cease doing business with HumKo. On July 23, 1957, a settlement agreement of this complaint was effected by Local 984, Kuhne and the Regional Director of the National Labor Relations Board at Chicago. Thereafter Local 984 caused the picket line at the Champaign plant to be withdrawn.

There was a complete stoppage of all construction work from July 12, 1957 to July 23, 1957, at the site. Construction work was resumed on the morning of July 24, 1957, but such resumption was not normal, nor was there a normal number of employees back on the job until approximately two weeks after July 24, 1957.

The defendant International functions under a written constitution, and is comprised of an unlimited number of

local unions. One of the objects of the International is to organize all workers under one banner, and to educate them to cooperate in every movement which tends to benefit the organization. All members of the local unions are members of the International and the International approves or disapproves all contracts entered into between its members and their employers. The general president of the International has full power to determine who shall be members of the International, which determination is binding on the locals. The general president (a constitutional officer of the International) settles and determines all grievances and disputes submitted to him by joint councils and local unions. Whenever the general president makes a decision, or orders a local union to observe the union laws, and the local refuses to do so, the International may suspend or revoke the charter of the local. The by-laws of local unions are subject to the approval of the general president. The general president may appoint a trustee to take charge and complete control of the affairs of a local union. The trustee's acts are subject to the supervision of the general president and he may remove trustees at any time, and may appoint successor trustees. He may, in his discretion, restore self-government to a local union. The general president, when he deems it for the best interests of the International (which is composed of local unions), is empowered to remove any International organizer.

The charters of all local unions remain the property of the International. It may demand and receive the charter of any local at any time, and upon surrender of the charter all property of the local, including money on hand, becomes

the property of the International. The local must secure office supplies from the International. The International may control membership of the local. The International possesses power to assess local members and assess per capita taxes. The International controls secretary-treasurers of local unions, even to the extent of directing the increase and decrease in the amount of bonds to be furnished by such officials. The International has complete authority to audit the books of all locals. Before a local union is allowed to become involved in a strike, lockout, boycott, lawsuit or any serious difficulty such local union must immediately notify the joint council, of which it is a member, of the nature of the difficulty and of the action contemplated. The joint council then takes steps to approve or disapprove such contemplated action. The joint council then notifies the general president of the steps it has taken with respect to the proposed action. The general president is authorized to approve, disapprove, or modify the action of the joint council. Any local desiring to present a wage scale to its employers first submits a copy of the same to the joint council, if one exists in its city or vicinity. Should the same receive approval by the joint council, it is compulsory upon the local union to forward a copy of such wage scale to the general president for his approval before it is presented to any employer. The general president has the power to inquire into conditions surrounding the local union and if, in his judgment, conditions do not warrant its presentation, he immediately notifies the local union of his decision in the matter. A copy of the wage scale must be in the hands of the general president at

least thirty (30) days before presentation to the employer. No contract entered into between a local union and any employer is valid and binding upon a local union until approved by the general president (unless approval thereof is at any time specifically waived by him or his representative).

The International general president has complete control over the by-laws of the joint council, and all locals must affiliate with a joint council, comply with its laws, and obey its orders. All local unions must affiliate with and participate in activities of conferences when and to the extent ordered by the General Executive Board (of the International) in its discretion.

The International controls locals and their memberships through the provisions relating to Trials and Appeals of Local Officers and Members. The International dictates and/or controls the conduct of the local in the administration of its business, who shall be the local's officers, the local officers' duties, and the rules of order for the conduct of local union meetings.

SUMMARY OF CONCLUSIONS OF LAW

The Trial Court concluded

that during the period of July 12-23, 1957, the plaintiffs were engaged in an activity affecting commerce;

that the defendants, Local 984 and the International, are labor organizations within the purview of, and subject to, the Labor-Management Relations Act;

that on July 12, 1957, the primary situs of the labor dispute between Local 984 and the International on

the one hand, and HumKo on the other, was at the Thomas Street plant of HumKo in Memphis, Tennessee;

that the placing of the pickets at HumKo's Champaign plant constituted a secondary boycott in violation of Title 28, U. S. C. A. § 187;

that the acts of Local 984, in sending pickets from Memphis, Tennessee, the situs of the primary employer, HumKo, to Champaign, Illinois, and in setting up a picket line at the construction site there, had the effect of inducing and encouraging the employees of Phillipy and Kuhne, secondary neutral employers, to strike or engage in a concerted refusal to work or perform services for Phillipy and Kuhne which, in turn, resulted in forcing Phillipy and Kuhne to cease doing business with HumKo;

that the International, by exercising control over Local 984, by virtue of its employees' (acting within the scope of their authority) participation in collective bargaining negotiations with the primary employers, and by instructing and directing the pickets at the situs of the secondary employer, had knowledge of, participated in and ratified the acts and conduct of its Local 984;

that thereby, with Local 984, the International established and maintained a secondary boycott at the Midwest Refinery of HumKo at Champaign, Illinois;

that the plaintiffs are entitled to recover all damages which flowed directly and proximately from the establishment of the proscribed secondary boycott, HumKo having suffered damage to its business in the amount of $57,013.05, Phillipy having suffered damage to its business and entitled to recover damages in the amount so suffered, and Kuhne having suffered damage to its business and entitled to recover damages in the amount suffered.

DISCUSSION

Under the provisions of Rule 52(a) F. R. C. P. this Court is bound by the findings of the fact of the Trial Court unless they are clearly erroneous. In applying this rule in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), the Supreme Court enunciated the following test:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. Oregon Medical Society*, 343 U. S. 326, 339; *United States v. United States Gypsum Co.*, 333 U. S. 364, 395."

In analyzing the findings of fact of the Trial Court below in the light of this standard as our test, a review of some of the testimony adduced at the trial is illuminating.

George Nesmith testified that he was a resident of the State of Illinois; that he was a member of the Painters' Union for 14 years; that on the 12th day of July, 1957, he was employed at the Midwest Refinery of HumKo, and that he and his group were in the process of spraying ceilings in the refinery; that prior to the 12th day of July he was foreman of the painters on the job and had 6 painters working under him; that on the 12th day of July he went to the Midwest Refinery for the purpose of going to work; that when he arrived at the gate of the plant he observed electricians, carpenters, bricklayers and steam fitters idling around the gate; that he talked to two men who were standing in the center of the driveway and asked them if he could get into the plant because he had paint in the spray

cans in the plant and the paint had to be cleaned out or it would be ruined; that they talked it over and told him that he could go in if he did not take anything in, but that he couldn't bring anything out; that he could go in and clean up the equipment and get out as quickly as he could, and that he hurriedly got the equipment clean and came right out past the gate; that of the 6 men who were working under him as painters none went to work on July 12, 1957, because it was against the union rules to go across the picket line; that he returned to the plant almost every day for around 12 working days after the 12th of July and until the 23rd of July, and he observed that there was no one going through the gate and that he saw pickets at the entrance gate; that none of the painters working under him did any work toward the construction of the refinery during the period between July 12 and July 23, 1957; that he took his orders on the job from the Superintendent of Kuhne-Simmons Company.

The same story, in broad outline, was told by the witness Ernest Smith, who was a resident of Urbana, Illinois, and employed at the Midwest Refinery at Champaign as a roofing foreman on July 12, 1957, and in charge of a crew of 5 men; also testifying to the same effect was William Paul, a resident of Champaign and employed by Kuhne-Simmons Company as one of 25 carpenters; Joe Vaughn of Champaign also testified that he was a masonry foreman heading a crew of 8 to 12 men, and his testimony paralleled that of Nesmith and Paul. The import of the testimony of these four witnesses is the same . . . men attempting to go

to work, confronted with a picket line and unable to cross the picket line because of union prohibition.

There was testimony by witnesses who were employed at the HumKo plant in Memphis, Tennessee. One of these, John Council, testified that he was working at the HumKo plant at Memphis, Tennessee, as a machine operator during the time when the strike was called at that plant, and at the time of his testimony he was still employed at the HumKo plant at Memphis, Tennessee; that he worked the picket line at the HumKo plant at Memphis during the progress of that strike; that he attended meetings of Teamsters Union Local 984 during the strike; that he also attended meetings of this Local after the pickets were withdrawn from the HumKo plant at Champaign, Illinois, these meetings being held also at Memphis, Tennessee, and he identified union officials present at the meeting as Mr. Farrell, Mr. Koppeis and Mr. Kuhns; that at the meeting in the union hall at Memphis, after the picket line had been withdrawn at Champaign, he heard a statement made by one of the three aforesaid officials of the Union that "they had to withdraw the pickets, they were against construction and not against HumKo employees" He further heard one of these union officials make the statement that the picket line would be reinstated in Champaign when the plant started producing.

Additional testimony by witnesses employed at the Memphis plant was given by James Monasco, an operator in the deodorizing department, by Norman Johnston, a truck driver, and by William Kean, a maintenance worker. Their

testimony was all of the same import and a composite of their testimony reveals

> that they participated in the strike conducted at the Memphis plant;
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> that they heard particular union officials (naming them) state unequivocally that the strike at Champaign was to cause the cessation of the construction work there;
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> that men were needed to go up to Champaign from Memphis to replace the pickets;
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> that the picket line was effective in stopping the construction work;
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> that the Local had 100% backing by the International;
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> that the Local paid the expenses of the pickets imported to Champaign from Memphis;
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> that when the picket line at the Champaign plant was withdrawn the union officials were satisfied there would be at least a 5-month delay in the resumption of construction of this plant because of the disbursement to all parts of the country of the contractors and employees occasioned by the picketing;
>
> that there was no effort made to prevent HumKo employees in the category of office workers and engineers from entering the plant . . . no effort, in other words, to engage in primary picketing.

From the contents of the foregoing, together with a detailed examination of *all* of the evidence, this Court "is left with the definite and firm conviction" that no "mistake has been committed,"[1] that there is substantial evidence to support the findings of the Trial Judge, and to satisfy us that the object or purpose of the picket line at

[1] *McAllister* v. *United States*, 348 U. S. 19, 20 (1954) supra.

the Midwest Refinery of HumKo at Champaign, Illinois, from July 12, 1957, to July 23, 1957, was to stop construction work on this refinery, and that this objective was achieved as a result of the picketing operation. The picketing brought about a complete stoppage of all construction work from July 12 up to and including July 23, 1957, at the construction site. True it is that there exist conflicts in the testimony when a comparison is made of the testimony of the witnesses on direct examination with that developed on cross-examination, but such conflicts are for resolution by the trier of the facts. *(Akron Dry Goods Company* v. *Commissioner of Internal Revenue*, 218 F. 2d 290 (6 Cir., 1954).

There is substantial evidence that when the union officials at Memphis sent their union members from Memphis to Champaign they did not have primary picketing as an objective. This is bolstered by evidence to the effect that there was neither intention nor effort to exert pressure of any kind upon the salaried, supervisory and engineering employees of HumKo at Champaign and that, in fact, no pressure was exerted upon them,—they were free to come and go as they pleased.

It is not disputed that as of July 12, 1957, the plant was in the process of construction, and that it was not in production. This serves to support the theory that there could not have been lawful primary picketing at this plant. Since the plant was in the process of construction, it would not have been possible for a production schedule to have been in operation.

The agreement to furnish all labor and material, and for the installation and erection of the Midwest Refinery of HumKo Company at Champaign, Illinois, was executed between the HumKo Company, a Tennessee corporation, as the owner, and the Kuhne-Simmons Company, Inc., an Illinois corporation, as contractor, under plans and specifications prepared by Kraft Foods Company Engineering Departmen Howard A. Tonsager, Architect, of Chicago, Illinois; this contract further providing that "All work shall be performed in accordance with instructions of Architect's Superintendent or Executive Engineer subject to the provisions of Paragraph 3 hereunder." Paragraph 3 is as follows:

> "The Owner may at any time and from time to time during the progress of the work, without in any way rendering void the contract, order alterations in, additions to, or deductions from the work, and when so ordered in writing the Contractor shall promptly proceed with such changes without causing delay."

The contract further provides:

> "Payment of the remaining ten percent (10%) of such request shall be made within thirty (30) days after the completion of all work and final acceptance by the Owner of all materials and workmanship in accordance with the terms of this contract; . . ."

The completion date specified in this construction contract is covered by the following provision:

> "The Contractor agrees to commence work hereunder promptly, to prosecute such work diligently and to complete all of such work in accordance with said plans and specifications and the terms hereof on or before August 16, 1957."

As senior vice president of the HumKo Company, J. H. Kirby testified that he was in charge of production and research for the entire HumKo division, and that the Midwest Refinery plant of the HumKo Company began production on a limited basis in the first week of January 1958.

The appellants cite extensive authority for the proposition that picketing of a primary employer, at a place of business of the primary employer (even though not the situs of the dispute) is legitimate, even though the effect of such lawful picketing is to induce employees of others engaged on the same site to refuse to cross the picket line. In appellants' letter memorandum of February 5, 1960 to this Court, they further contend that "assuming *arguendo* that it was the union's intent to induce or encourage the employees of the contractors to engage in a concerted refusal to work, so as to require the contractors to cease doing business with National HumKo, then our answer is still that *such conduct is legal because it occurred at a situs owned, occupied and controlled by the primary employer and is protected conduct under Section 13 of the Act.*" As authority for this they cite *Local 618, Automotive Petroleum, etc., Union v. NLRB (Site Oil)*, 249 F. 2d 332 (8 Cir., 1957); and *Seafarer's Union* v. *NLRB (Salt Dome)*, 265 F. 2d 585 (D. C. Cir., 1959).

In analyzing all of the authority to which the appellants have referred, and in attempting to apply it to the facts as they appear in this controversy, we can only say that we take no issue with appellants' citations, and would readily apply them if we had under consideration a factual situa-

tion which fitted into the mold of the citations. We fail to recognize comparable situations between the facts here and those present in the cases upon which appellants rely.

Of the Taft-Hartley Act, the Supreme Court has said that it

> "was designated to protect the public interest, but not in the sense that the public was to be shielded from secondary boycotts no matter how brought about. Congress' purpose was more narrowly conceived.
>
> It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict; the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L., et al.* v. *National Labor Relations* Board, 357 U. S. 93, 100 (1958).

In our consideration of the various facts relative to the category of the picketing at the Champaign plant of HumKo—whether it was primary or secondary—the following picture has presented itself:

> An owner of a piece of property who has contracted with a general contractor to install and erect a building, including the furnishing of all labor and material, for the price of $1,942,471, with the right of supervision in the architect;
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> a completion date of August 16, 1957;
>
> a provision for final acceptance by the owner;
>
> a work stoppage preventing construction of the building brought about by a picket line transported 400

miles to the site for the express purpose of delaying construction at a time when construction was only 75% completed, the owner of the property being a primary employer of employees at its plant in Memphis;

a labor dispute at the Memphis plant and failure of the Local to petition for bargaining rights at Champaign;

picketing inaugurated at a time when the possession of the plant was still in the general contractor pursuant to the provisions of the construction contract;

a 12-day work stoppage (resulting in a construction delay) at a time approximately six months before the owner of the plant began production (limited) in the normal operation of its business;

no labor dispute being in existenc between the contractor and/or subcontractors and their employees;

the picket line being the cause of the refusal of the employees to continue work;

the Union, in fact, inducing and encouraging the employees of the general contractor and of the subcontractors to engage in a concerted refusal to perform the services for which they were employed;

the object of such action (clause above) being to force the general contractor to cease doing business with the owner.

This picture presents a form of picketing that has been determined by this Court in *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F. 2d 637, 642 (6 Cir., 1952), to have "extended beyond the limits of primary picketing and constituted a secondary boycott through pressure on the general contractors" and to have been "in violation of § 303 (a) (1) of the Labor Management Relations Act here-

inabove set out." (See Appendix for text of 303 (a) (1), 29 U. S. C. A. § 187.)

The International Union, as appellant, additionally contends that it did not participate in, authorize, or ratify, or otherwise engage in such conduct as to become liable for the acts and conduct of the appellant Local 984, or the agents, or any member of this Local; whether the International Union is liable depends upon the conduct and/or activity of Francis J. Murtha who, during the period involved in this controversy, identified himself as a general organizer of the International Union living in Memphis, Tennessee, who made use of a desk and telephone in the office of Local 984, and who also used his home as an office, and whose duties during the year 1957 were those of a union investigator and negotiator, and worker in the preparation of arbitration cases. He testified that during the year 1957, Local 984 did not request approval, sanction, or assistance from the International in connection with the strike against HumKo. The testimony further established:

> that Murtha, in his capacity as a representative of the International Union, participated in negotiations with HumKo to assist members of Local 984;
>
> that Murtha's participation in this respect was prior in time to the picketing at Champaign, continued through such period, and was still going on when the pickets were withdrawn from the plant at Champaign by the Union;
>
> that Murtha had actual notice that picketing was going on at Champaign while the building was under construction;

that he had actual knowledge of a complaint filed with the National Labor Relations Board in Chicago by a neutral employer at Champaign, in relation to the picketing of the construction job by the union pickets.

It is not unreasonable to believe that before embarking on a 400-mile trip with a group of union members for the purpose of a picketing operation, the officials of the union would, in preparation for such a trip, make inquiry as to the situation at the site where they would commence the picketing before they authorized such an undertaking. There is nothing "wildcat" about a 400-mile trip taken by a group of adults, with a union official in charge. In preparing for this trip the officials of the union knew, or should have known, that the picketing was going to take place at a plant that was under construction—not completed—and not in production. The officials who were in a position to know of the conditions that would confront the pickets at the end of the 400-mile trip included Mr. Murtha, because of his close association with Local 984, as a representative of the International Union.

It is unrealistic to believe that Mr. Murtha, as a paid investigator for the International Union, would not have had facts in his possession which were indicative of a clear-cut violation of a mandatory provision of the constitution of the International Union—that Local 984 was becoming involved in a boycott (Champaign) and in a lawsuit (with the neutral employer and the National Labor Relations Board at Chicago) without giving the Joint Council immediate notice, and thus indirectly the General President of the International Union, of the contemplated

action, or of the serious difficulty (the lawsuit). Mr. Murtha would further have us believe that he stood idly by, as a paid investigator of the International Union, and did not make this violation known to his superiors in the International Union.

The dominion exercised over the Local Union by the International, as evidenced by the constitutional requirements previously set forth in the summary of the findings of fact, as well as by many other provisions of the constitution, establishes a status of parenthood that brings the local union into the family by depriving such local union of that degree of independence associated with, and a necessary ingredient of, an autonomous organization. Since Mr. Murtha, as the representative of the parent organization, was an active participant in the activities of the Local at Memphis, and since the secondary boycott at Champaign was conceived in the environment surrounding Mr. Murtha (at Memphis), he and his principal, the International, knew, or should have known, of the secondary boycott in Champaign. By its silence and inaction, the International, through Mr. Murtha, acquiesced in and condoned the illegal activity of the Local Union at a time when there was full opportunity to step in and prevent such activity. Therefore the International is liable as a principal actor in bringing about a secondary boycott. It is impossible for it to have been as close to the affairs of Local 984, through the participation of Mr. Murtha, its agent, without its being a part of the activity of the Local. Certainly, from Mr. Murtha's dealing with Local 984 in the negotiations with HumKo

in the labor dispute (out of which the secondary boycott at Champaign was conceived), the Trial Court had before it substantial basis for the conclusion that the International did participate in, authorize, and ratify the actions of the Local in this boycott. It did, through Mr. Murtha, acting within the scope of his authority as an International representative, engage in a course of conduct in such a manner as to become liable for the actions of Local 984, and its agents, in the maintenance of the picket line at the HumKo plant at Champaign. Furthermore, the Trial Judge had the opportunity to see and hear the witnesses and was therefore in a position to appraise the credibility of each of them.

The appellants contend that, even if liability for the secondary boycott is chargeable to them, the damages found by the District Court are excessive, and are not supported by competent evidence (with the exception of the claims by Phillipy).

We are of the opinion that the three judgments which are the subject of this review are supported by substantial and sufficient evidence, which also supports the findings and conclusions of the Trial Judge, that the International Union and Local Union 984 (in all three cases), as well as Farrell and Murtha (each in his representative capacity only), in Cases Nos. 3254 and 3255 are jointly and severally liable to the plaintiffs for the damages entered by the District Court, subject to the modifications hereinafter set forth.

Responsible officials of HumKo testified as to losses sustained by that company through the work stoppage brought about by the secondary boycott; Mr. Kuhne, of Kuhne-Simmons Company, who had a background of 30 years as a contractor, testified as to the reasonableness of the charges for equipment that was idled by the work stoppage. He also identified all other losses sustained by his company as losses resulting directly from the illegal work stoppage sponsored by the appellants. In *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562, 563 (1931), there is stated the following:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. . . .
>
> • • •
>
> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The appellants challenge the validity of the Trial Court's award of attorney fees as an element of damages in each of the three claims. The appellees reply by stating that this question has been determined in their favor in *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 189 F. 2d 177 (9 Cir., 1951), and in *International Longshoremen's Union* v. *Hawaiian Pineapple Co.*, 226 F. 2d 875 (9 Cir., 1955). An examination of these opinions discloses that neither of them is authority for allowing attorney fees to any of the prevailing parties as an item of damages sustained by reason of the illegal work stoppage at the plant at Champaign. The general rule in relation to awarding damages for attorney fees is "Attorney's fees can ordinarily be obtained by a prevailing party against an adverse party only by virtue of: 1. A statute or rule of court, or 2. The provisions of a written agreement or contract." *Standard Accident Ins. Co. of Detroit, Mich.* v. *Hull*, 91 F. Supp. 65, 66 (1950).

The $1,000 attorney fee paid by HumKo in assisting Kuhne in the removal of the picket line at Champaign, as well as the $1,000 attorney fee paid by Kuhne in filing the charge with the National Labor Relations Board to bring about the removal of the picket line so that they could proceed with the completion of the construction contract, are proper items of damage.

Counsel have not cited, nor are we familiar with any applicable statute, rule of court or provision of any written

agreement or contract that authorized the Trial Court to award attorney fees as an element of damages.

Mr. J. H. Kirby, as senior vice president of HumKo, testified under cross-examination as follows:

> "Q. Now, you say all of these employees that we are talking about, the so-called trainees, spent a week idle in the hotel? I believe you were clear on that, right?
>
> "A. Mr. Morris, when the strike started, I told the men to go to the hotel and stay.
>
> "Q. All right.
>
> "A. And exactly the number of days, I don't know, but I believe for practically all of the first week that almost all of them did stay in the hotel. It was about a week later that those fellows, of their own accord, decided to come back.
>
> "Q. There was then an interruption in their training [435] as a result of the strike here in Memphis; is that correct?
>
> "A. That's right, a few days.
>
> "Q. That interruption had nothing to do with the picketing in Champaign, did it?
>
> "A. So far as those few days are concerned, no."[2]

From the foregoing testimony it is impossible for this Court to determine just what days the trainees were idled, and it is further impossible for us to determine from any of the testimony, or from the exhibit that itemizes the alleged damages of HumKo resulting from the secondary boycott, whether the time lost by the trainees, as well as their ex-

[2]Appendix 305a, Joint Volume I, filed with this Court as part of this appeal.

penses during this period, as a result of the strike at Memphis (which strike had nothing to do with the picketing at Champaign), are included in the award of damages to HumKo. If so, an adjustment of the award should be made by the Trial Court.

As a result of our review of this case, as set forth in the preceding observations and analysis

Case No. 13896 is remanded with instructions that the award of damages be adjusted by withdrawing the $5,000 attorney fee as an item of damage, and that consideration be given to an adjustment in the award of damages in the event it is determined that the time and expenses of the trainees at Memphis, who were idled as a result of the Memphis strike, are included in the total award. In all other respects this judgment of the District Court is affirmed.

Case No. 13897 is remanded with instructions that the award of damages be adjusted by withdrawing the $3,500 attorney fee as an item of damage. In all other respects this judgment of the District Court is affirmed.

Case No. 13898 is remanded with instructions that the award of damages be adjusted by withdrawing the $5,000 attorney fee as an item of damages. In all other respects the judgment of the District Court is affirmed.

This case is hereby remanded to the District Court for proceedings not inconsistent with the views expressed herein.

APPENDIX

Page

Section 303(a) of the Taft-Hartley Act—29 U. S. C. A. § 187 1

Questions for review on appeal, as submitted by appellants 3

Counterstatement of questions for review on appeal, as submitted by appellees 4

SECTION 303(a) OF THE TAFT-HARTLEY ACT 29 U. S. C. A. § 187*

29 U. S. C. A. § 187. "Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages.

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any

*Not including the September 14, 1959, Amendment.

other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E. D. T., c. 120, Title III § 303, 61 Stat. 158."

QUESTIONS FOR REVIEW ON APPEAL, AS SUBMITTED BY APPELLANTS

"1. Under § 303(a) of the Taft-Hartley Law [29 U. S. C. A. § 187(a)], may a labor union, without regard to the 'situs' of its labor dispute, follow the primary employer to a site occupied by him together with secondary employers and publicize its dispute by picketing the primary employer at one of his places of business removed from the 'situs' of the dispute, where such picketing has the effect to induce employees of secondary employees to engage in work stoppage?

"2. Where certified Union's object is to require primary employer to bargain does the proviso to Section 303(a)(2) of the Taft-Hartley Act [29 U. S. C. A. § 187(a)(2)] permit union to induce employees of secondary employers to engage in work stoppage?

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[1]So in original. Probably should read "of."

"3. Are the findings of the District Court with respect to (1) Appellees' activities at its place of business in Champaign, Illinois; and (2) Appellants' activities and purposes in Champaign, Illinois; 'clearly erroneous' within the meaning of Rule 52, F. R. C. P.?

"4. Are the District Court's findings and conclusions as to damages clearly erroneous?"

COUNTERSTATEMENT OF QUESTIONS FOR REVIEW ON APPEAL, AS SUBMITTED BY APPELLEES

"1. Did the appellants, International Teamsters Union, and International Teamsters Local 984 of Memphis, Tennessee, which were on strike against HumKo at its manufacturing plant at 1702 Thomas Street, in Memphis, Tennessee, its normal place of business, post pickets at a construction job in Champaign, Illinois, to induce the employees of independent contractor employers constructing that plant to engage in a concerted work stoppage with an object of the picketing being to force these contractor employers to cease performing their contracts with each other or with HumKo?

"2. Did International Teamsters Union expressly or impliedly, (or is it estopped to deny that it did), authorize, ratify, participate in or render guidance to its Local 984 in the strike and the use of picketing to induce the employees of independent contractors constructing a plant for HumKo at Champaign, to engage in a concerted work-stoppage, where an object of the picketing was to force these contractor employers to cease performing their con-

tracts with each other or with HumKo so as to make it liable to Kuhne-Simmons Co., Inc., for damages?

"3. Are the findings of fact by the District Court with respect to appellants' activities and purposes constituting a secondary boycott clearly erroneous on the evidence?

"4. Are the District Court's findings as to Kuhne-Simmons Co., Inc.'s damages clearly erroneous on the evidence?"

APPENDIX B

No. 13,896

JUDGMENT

February 15, 1961

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, and the case remanded to the District Court for proceedings not inconsistent with the views expressed in the opinion herein.

Approved For Entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

A 37

No. 13,897

JUDGMENT

February 15, 1961

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, and the case remanded to the District Court for proceedings not inconsistent with the views expressed in the opinion herein.

Approved For Entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

No. 13,898

JUDGMENT

February 15, 1961

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, and the case remanded to the District Court for proceedings not inconsistent with the views expressed in the opinion herein.

Approved For Entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

APPENDIX C

Nos. 13,896-7-8

United States Court of Appeals

FOR THE SIXTH CIRCUIT

ORDER ON PETITION FOR REHEARING

Before: McAllister and Pope, Circuit Judges, and Thornton, District Judge.

Thornton, District Judge. It appears from the petition for rehearing that there is no matter contained therein that was not included in this appeal as originally presented. The determination of said appeal and the opinion heretofore filed are in accordance with the conclusions reached by this Court after its thorough consideration of all the factors presented on appeal.

The petition for rehearing is denied.

Approved for entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

Filed
3-31-61

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 3253—Civil

THE HUMKO COMPANY, INC.,
Plaintiff,

vs.

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated labor organization; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated labor organization,
Defendants.

No. 3254—Civil

Ralph Kent Phillipy, C. C. Penny and Cummins Templeton, Trustees, doing business as O. R. PHILLIPY & SONS COMPANY,
Plaintiffs,

vs.

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated association and its President, R. A. Farrell; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated association, and its International or Field Representative, Francis J. Murtha,
Defendants.

No. 3255 — Civil

KUHNE-SIMMONS COMPANY, INC.,
an Illinois Corporation,
Plaintiff,

vs.

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-

CIO, an unincorporated association and its President, R. A. Farrell; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated association, and its International and Field Representative, Francis J. Murtha,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

These cases were brought by The Humko Company, Inc., Ralph Kent Phillipy, et al, Trustees, and Kuhne-Simmons Company, Inc., against the defendant Unions and their representatives under the Labor Management Relations Act, Sec. 301 and 303, commonly known as the Taft-Hartley Act (hereinafter called "the Act"), 29 USCA, Sec. 185 and 187, and 28 USCA, Sec. 1337 and 1338. Before trial these three cases were consolidated for the purpose of trial.

These cases were tried before the Court without a jury and, in respect to same, all three involved the same subject matter except as regards the damages claimed by the respective plaintiffs.

Upon the entire record, including the pleadings, testimony of witnesses in open court, depositions and briefs of counsel, the Court makes the following:

FINDINGS OF FACT

I.

At all times material herein, The Humko Company, Inc., (hereinafter called Humko) a Tennessee Corporation, was a division of National Dairies, with its plant on Thomas Street in Memphis, Tennessee, where its normal business was the manufacturing, selling and distribution of edible fats and oils.

D. R. PHILLIPY & SONS COMPANY, (hereinafter called Phillipy) with its principal place of business in Memphis, Tennessee, was a mechanical contracting firm.

Kuhne-Simmons Company, Inc., (hereinafter called Kuhne) was an Illinois Corporation with its principal office located at Champaign, Illinois, and was engaged in the general construction business.

II.

At all times material herein the defendant, Local Union 984, International Brotherhood of America, (hereinafter called Local 984) was an unincorporated association organized and existing for the purpose, among other things, of representing employees for the purpose of collective bargaining with their employers. It maintained its offices and place of business in Memphis, Shelby County, Tennessee, and did business regularly within the jurisdiction of this Court. Defendant, R. A. Farrell, a resident of Shelby County, Tennessee, was President and Chief Executive Officer of Local 984 and was, in this suit, sued in his representative capacity; and that Local 984, as such labor organization, was subject to the Act.

III.

The defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (hereinafter called International) was an international labor union organized as an unincorporated association. The International was composed of subordinate affiliated local labor unions located throughout the United States, and Local 984 was one of such subordinate affiliated local labor unions. The International maintains its headquarters and

principal place of business in Washington, D. C., but conducted business regularly within the jurisdiction of this Court through its member, Local 984, and its agent or representative, Francis J. Murtha, a resident of Memphis, Shelby County, Tennessee, and the defendant, Francis J. Murtha, is sued in his representative capacity only; and that the International, as a labor organization, was subject to the Act.

IV.

Francis J. Murtha, on July 12, 1957, was an organizer for International for ten Southern states, including Tennessee, with headquarters in Memphis, Tennessee, and as such his duties consisted of general duties which were assigned to him by the President or those in authority of the International to make investigation, assist in negotiations, conduct elections, trusteeships, attend hearings, and advise with the officers of local unions in respect to organizing employees of various employers. Francis J. Murtha had a desk where he transacted business on behalf of the International in the Local 984 Headquarters, in Memphis, Tennessee. He had the use of the telephone and secretaries in the office of Local 984.

V.

Local 984 was, on July 12, 1957, the certified Bargaining Agent for the Production, Maintenance and Driver hourly paid employees of the Thomas Street plant of Humko. Farrell and Kuhns, as officers of Local 984, attended and participated in collective bargaining negotiations with officials and representatives of Humko at Memphis to secure a contract for the Production, Maintenance and

Drivers hourly paid employees of the Thomas Street plant of Humko before, during and after the period of picketing at Champaign. Francis J. Murtha attended and took an active part in several of the collective bargaining meetings with the officials of Humko and the officials of Local 984. At least on one occasion Francis J. Murtha was the only representative participating in such collective bargaining negotiations with officials of Humko. At all times during such negotiations and during the period that Francis J. Murtha was engaging in such negotiations his sole and only occupation was as International organizer, and he was receiving his usual and customary salary from the International and was not paid in any way for his services by Local 984.

VI.

On July 8, 1957, during the negotiations between Local 984 and Humko, a picket line was placed at the Thomas Street plant of Humko, and on July 12, 1957, a labor dispute existed between Humko and Local 984.

VII.

In the latter part of 1956, Humko entered into a firm contract with Phillipy and Kuhne, as independent contractors, for the construction of a plant to be known as the Midwest Refinery of Humko on South Mattis Road, in Champaign, Illinois, (about 400 miles from the Humko plant at Memphis, Tennessee) which, when completed, would produce edible fats and oils, and that on July 12, 1957, pursuant to such contract, Phillipy and Kuhne were engaged in the construction of this plant. In such construction, no employees of Humko did any work of any kind or

nature whatsoever in such construction, and no employee or official of Humko gave any instructions or directions to any of the employees of Phillipy or Kuhne or any other contractor or subcontractor engaged in such construction.

VIII.

On July 12, 1957, both Phillipy and Kuhne had numerous employees of their own engaged in such construction, all of whom were members of some labor union. Phillipy and Kuhne, as independent contractors, also had several sub-contractors performing work and services on this project, all of whose employees were members of various union labor organizations. Three of such sub-contractors of Kuhne were Midwest Roofing Company of Champaign, Illinois, Champaign Asphalt Company, Champaign, Illinois, and Evan Rasmussen, Masonry sub-contractor, of Champaign, Illinois.

IX.

Neither Phillipy nor Kuhne, nor any contractor or sub-contractors, nor any of their employees, on July 12, 1957, had any labor dispute with Local 984, the International, or any other labor organization or union, local or international.

X.

The construction site of Midwest Refinery was wholly enclosed by a wire cyclone fence and the entrance gate to the construction site was a wire cyclone gate on Mattis Road where all of the employees of Phillipy and Kuhne and other contractors and sub-contractors entered the construction site.

XI.

On July 12, 1957, the construction of the Midwest Refinery was approximately 65 to 70 per cent completed. The possession of the plant or any part of it had not been turned over to Humko and on July 12, 1957, the only employees of Humko at the construction site were salaried supervisory and engineering employees. There were no Production, Maintenance and Drivers hourly paid employees of Humko at the construction site.

XII.

On July 12, 1957, the machinery for the manufacturing of edible fats and oils was not yet installed in the Midwest Refinery of Humko in Champaign, no raw materials for such manufacturing process were on the job site, and no edible fats or oils were being manufactured, sold or distributed at the Midwest Refinery of Humko in Champaign, Illinois. All of these facts were known to the agents and officers of Local 984 and the local agent of the International.

XIII.

An officer and agent of Local 984, with several striking Humko employees, whom this officer had taken with him to Champaign, Illinois, attended a meeting of business representatives of various unions at the meeting place of the Champaign Trades and Labor Council, and requested them and their Union to instruct their members not to cross the picket line and not to do any work for their neutral contractor employers who were in the process of constructing the Humko plant. He also told them they would be very poor union members if they did not respect the picket line and

that not withstanding any advice to the contrary he was going to set up the picket line on the following morning.

XIV.

On the morning of July 12, 1957, pickets from Local 984, who had been brought from Memphis, Tennessee, by an officer of Local 984, formed a picket line at the entrance gate of the Midwest Refinery of Humko at Champaign, Illinois, carrying placards bearing the legend:

"Production, Maintenance and Driver employees of The Humko Co., Memphis, Tennessee, ON STRIKE for better wages & working conditions—Members of General Drivers, Salesmen & Warehousemen's Local Union No. 984, AFL."

These pickets maintained such picket line continuously until the late afternoon of July 23, 1957. The purpose of the picket line was to stop construction work at the Midwest Refinery of Humko in Champaign, Illinois.

XV.

During the maintenance of such picket line in Champaign, a man appeared at the picket line stating that he was from the International and directed and instructed the pickets to keep walking the picket line, and these directions and instructions were followed and obeyed by the pickets. The name of the man was Mesner or Mesjner.

XVI.

On July 12, 1957, the employees of Phillipy, Kuhne and the other contractors and sub-contractors engaged in such construction work, appeared for work but none of such employees crossed the picket line on July 12, 1957, or on any subsequent working day during the time that the picket

line was maintained, for the purpose of working on such construction. No construction work of any kind was done from the morning of July 12, 1957, until the morning of July 24, 1957, by any of the employees of Phillipy or Kuhne or any other contractors or sub-contractors engaged in such construction work. These contractor employers on the job (who were secondary neutral employers) were thereby forced to cease doing business with Humko.

XVII.

On July 15, 1957, while the picket line was maintained at the Humko plant in Champaign, Illinois, at a collective bargaining meeting in Memphis, Tennessee, between Local 984 and officials of Humko, it was stated in substance by a Humko official that future negotiations were being made more difficult by the picket line being maintained at the Humko plant at Champaign, Illinois. Francis J. Murtha, International organizer, was present at this meeting when this statement was made, but no objection to or repudiation of such statement or fact was made by Francis J. Murtha on behalf of the International.

XVIII.

During the maintenance of the picket line at Champaign, Illinois, Local 984 was assured as a result of a statement made by its President, R. A. Farrell, at a local union meeting, that the International was one hundred percent behind it in that effort.

XIX.

On July 15, 1957, Kuhne, by R. W. Kuhne, its President, prepared and filed with the National Labor Relations Board, 13th Region, in Chicago, Illinois, a complaint charg-

ing Local 984 with setting up and maintaining a picket line at the Midwest Refinery of Humko at Champaign, Illinois, charging that such picket line encouraged and induced the employees of Kuhne to engage in a strike or concerted refusal to work or perform services in the course of their employment, the object of which was to force Kuhne to cease doing business with Humko. On July 23, 1957, a settlement agreement of this complaint or charge was executed by Local 984, Kuhne and Ross Madden, Regional Director of the 13th Region of the National Labor Relations Board, Chicago, Illinois, and thereafter Local 984 caused the picket line at the Humko plant in Champaign, Illinois, to be withdrawn.

XX.

There was a complete work stoppage of all construction work from and including July 12, 1957, through July 23, 1957, at the construction site, and construction work was resumed on the morning of July 24, 1957, but there was not a normal resumption of construction work nor a normal number of employees until approximately two weeks after July 24, 1957.

XXI.

The defendant, International, functions under a written constitution. The International consists of an unlimited number of local unions. One of the objects of the International is to organize all workers under one banner and to educate them to cooperate in every movement which tends to benefit the organization. The International approves or disapproves all contracts entered into between its members and their employers, and all members of local unions are

members of the International. The General President of the International has full power to determine who shall be members of the International, which shall be binding on the locals. The General President (a constitutional officer of the International) shall settle and determine all grievances and disputes submitted to him by joint councils, local unions. In the event the General President makes a decision or orders a local union to observe the laws, and the local refuses to do so, the International may suspend or revoke the charter of the local. The By-laws of local unions shall be subject to the approval of the General President. The General President may appoint a trustee to take charge and complete control of the affairs of a local union. The trustee's acts shall be subject to the supervision of the General President and he may remove trustees at any time and may appoint successor trustees. The General President may, in his discretion, restore self government to a local union. The General President, when he deems it for the best interests of the International (which is composed of local unions) is empowered to remove any International organizer.

The charters of all local unions remain the property of the International, who may demand and receive the charter of any local at any time, and upon surrender of the charter all property of the local, including money on hand, becomes the property of the International. The local must secure office supplies from the International. The International may control membership of the local. The International possesses power to assess local members and assess per capita taxes. The International controls local secretary-

treasurers of local unions even to the extent of directing the increase and decrease in the amount of bonds to be furnished by such officials. The International has complete authority to audit or have the books of all locals audited. Prior to a local union becoming involved in a strike, lockout, boycott, lawsuit or any serious difficulty, such local union shall immediately notify the Joint Council of which it is a member of any contemplated action setting forth the action contemplated and nature of the difficulty. The Joint Council shall then take steps to approve or disapprove such contemplated action. The Joint Council shall notify the General President of the steps it has taken in respect to such contemplated action. The General President is authorized to approve, disapprove or modify the action of the Joint Council.

Any local desiring to present a wage scale to its employers shall first submit a copy of the same to the Joint Council, if one exists in its city or vicinity. Should the same have the approval of the Joint Council, it shall be compulsory upon the local unions to forward a copy of the wage scale to the General President for his sanction before the same shall be presented to any employer. The General President shall have the power to inquire into conditions surrounding the local union, and if, in his judgment, conditions do not warrant the presentation of the same, he shall immediately notify the local union of his decisions in the matter. A copy of the wage scale must be in the hands of the General President at least thirty (30) days before presenting the same to the employers. No contract entered into between a local union and any employer or employer group shall be valid

and binding upon such local union until approved by the General President or unless approval thereof is at any time specifically waived by him or his representative.

The International General President has complete control over the By-laws of the Joint Council, and all locals must affiliate with one joint council and comply with its laws and obey its orders. All local unions must affiliate with and participate in activities of conferences when and to the extent ordered by the General Executive Board (of the International) in its discretion.

The International controls locals and their membership through the provisions relative to Trials and Appeals of Local Officers and Members. The International dictates the conduct of the local in the administration of its business, what the local's officers shall be, controls the local officers' duties, and dictates the rules of order for the conduct of local union meetings.

XXII.

The damages sustained by Humko, by reason of the work stoppage on the plant in Champaign, were as follows:

(a) The earnings of the Humko office and engineering employees at Champaign, and the trainee employees who had been hired in Champaign and sent to the Humko plant at Memphis for training at the time of the picketing in Champaign are damages suffered by Humko for thirty (30) days as stand-by charges caused by the work stoppage at Champaign. The amount of these earnings were $4139.12 for the employees at Champaign and $10,214.16 for the trainees at Memphis.

(b) The expenses paid by Humko to keep the trainees from Champaign in Memphis for additional thirty (30) day period as a result of the picketing in Champaign amounted to $3879.45.

(c) The amount required to pay for extra guard service from the Pinkerton Service during the actual picketing of the Champaign plant site as well as for regular guards for an additional thirty (30) days during which there was no production at the plant. This amount was $2394.24.

(d) Kraft Engineering Services providing for an additional thirty (30) days beyond the scheduled completion date which called for regular salaries during that period resulting from the work stoppage amounted to $6078.50.

(e) Expense of trip by Humko supervisor in Champaign to Memphis as a result of the picketing in Champaign amounting to $55.99.

(f) Expense of legal counsel to assist in obtaining the removal of the picket line in Champaign amounting to $1000.00, which is fair and reasonable under the circumstances.

(g) Amount required to pay taxes and insurance in the amount of $1230.00 on Humko's idle plant and property for an additional thirty (30) days as a result of the work stoppage brought about by picketing.

(h) Interest computed at 4½ percent in the amount of $23,021.59. At the time of the picketing, Humko had invested $6,139,090.00 in the plant at Champaign on which it is entitled to interest at the current bank rate for which it could have obtained loans during that time.

(i) Legal fee, in the amount of $5000.00, for the prosecution of this suit, which amount is fair and reasonable for the services rendered.

XXIII.

The damages sustained by Phillipy as a result of the work stoppage on the plant at Champaign were as follows:

(a) Loss of eight working days in the performance of its contract for the construction of the Humko plant during which time, and as a direct result of the picketing, it was deprived of the use of tools and equipment on the job, the reasonable rental value of which amounted to $4759.30.

(b) The sum of $2825.04, being the proportion of its yearly overhead attributable to the contract herein for the eight working days so lost.

(c) Out-of-pocket legal expense in the amount of $180.39 as a result of the picket line in Champaign.

(d) Attorneys' fees in the amount of $3500.00 for services rendered by the firm of Canale, Glankler, Montedonico, Boone & Locke in the prosecution of this suit, which amount is conceded by the defendants to be fair and reasonable compensation for such services.

XXIV.

The damages sustained by Kuhne by reason of the work stoppage were as follows:

(a) Kuhne, on July 12, 1957, had numerous pieces of construction equipment on the job site which were idled. It was deprived of the use of said equipment from July 12, 1957, through July 23, 1957, and the reasonable rental value of this equipment, based upon the usual, reasonable and customary charge made and paid for the use of said

equipment in the vicinity of Champaign-Urbana, Illinois, was $14,980.00.

(b) The sum of $1398.40, paid for wages plus contributions totalling $25.60 to employees' Welfare Fund to its hourly paid employees during the work stoppage, these employees being key employees needed by Kuhne upon resumption of the construction. The sum of $1288.00 for salaries plus $244.00 for payroll taxes and insurance paid by Kuhne to its salaried supervisory and office personnel who had been assigned to the Humko job.

(c) The sum of $2101.80 for general administrative and overhead expense paid by Kuhne during the period from July 12, 1957, through July 23, 1957, said payments being necessary to keep the working force of Kuhne in tact to resume work at the termination of the work stoppage.

(d) On July 12, 1957, Humko was retaining the sum of $108,933.00 from Kuhne on work completed by Kuhne as Retained Percentage under the terms of the contract between Kuhne and Humko and Kuhn was deprived of this money for twelve days which, at the rate of six (6%) per cent interest, is $214.92.

(e) The sum of $410.00, being the cost of checking existing concrete forms, grades, masonry work, materials, equipment and reinforcing steel after the pickets were removed from the job site and before construction could be resumed, together with the amount of $160.00, necessitated by reason of having to double handle brick for the construction work which could not be unloaded on the job site by reason of the picket line.

(f) Damages sustained by the three following sub-contractors of Kuhne as a result of the work stoppage occasioned by the picket line and for which these contractors have demanded payment by Kuhne:

Champaign Asphalt Company	$ 765.00
The Decorator	649.80
Midwest Roofing Company.	1121.00

(g) Legal fees resulting from the picket line and work stoppage in the preparation and filing of an unfair labor charge with the National Labor Relations Board, 13th Region, Chicago, Illinois, to cause the removal of the picket line and to minimize damages, by the firm of Reno & O'Byrne, in the sum of $1000.00, and legal fees in the sum of $5000.00, for services rendered by said firm in the prosecution of this suit, which amounts are fair and reasonable compensation for such services.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and of the subject matter of these cases.

II.

During the period of July 12-23, 1957, the plaintiffs were engaged in an activity affecting commerce as that term is used in the Act, and the defendants, Local 984 and the International, are labor organizations within the purview of and subject to the Labor Management Act.

III.

On July 12, 1957, the primary situs of the labor dispute between Local 984, the International and Humko was at the Thomas Street plant of Humko in Memphis, Tennessee.

United Brick and Clay Workers v. Deena Artware, 198 F. 2d 637, 6th C. A. (1952), Cert. Denied 344 U. S. 897; NLRB v. Associated Musicians, 226 F. 2d 900, 2nd C. A. (1955), Cert. denied 351 U. S. 962; NLRB v. Denver Building, 219 F. 2d 870, 10th C. A. (1955).

IV.

The placing of the pickets at Humko's Champaign plant constituted a secondary boycott in violation of Section 187 (a) (1), Title 29, USCA. The acts of Local 984 in sending pickets from Memphis, Tennessee, the situs of the primary employer, Humko, to Champaign, Illinois, setting up a picket line at the construction site there, had the effect of inducing and encouraging the employees of Phillipy and Kuhne, secondary neutral employers, to strike, or engage in a concerted refusal to work or perform services for Phillipy and Kuhne which, in turn, had the direct effect of attempting to force Phillipy and Kuhne to cease doing business with Humko, all of which is prohibited by the Act. United Brick and Clay Workers v. Deena Artware, supra.

V.

The International, by exercising control over Local 984, through its employees (acting within the scope of their authority) participation in collective bargaining negotiations with the primary employer, and their instructing and directing the pickets at the situs of the secondary employer, had knowledge of, participated in and ratified the acts and conduct of its Local 984 and, thereby, with Local 984 the International established and maintained a secondary boycott at the Midwest Refinery of Humko at Champaign, Illinois, Int. Brotherhood of Elec. Workers v. NLRB, 341 U. S.

694 (1951); International etc. v. Hawaiian Pineapple, 226 F. 2d 875, 9th C. A. (1955), Cert. denied 351 U. S. 963.

VI.

Officers, Farrell and Kuhn, on behalf of Local 984, and Francis J. Murtha, on behalf of International, were acting within the scope of their authority in conducting the contract negotiations and in bargaining with Humko which resulted in the picket line being established in Champaign, Illinois. Local 984 and R. A. Farrell, as its President, and the International and Francis J. Murtha, as its Field Representative, are jointly and severally liable to Phillipy and Kuhne for damages proximately resulting to these plaintiffs from the work stoppage in Champaign. Both Local 984 and the International are jointly and severally liable to Humko for damages to this plaintiff resulting from the picketing and work stoppage in Champaign. International, etc. v. Hawaiian Pineapple Co., Supra.

VII.

The plaintiffs are entitled to recover all damages which flowed directly and proximately from the establishment of the proscribed secondary boycott. United Elec. v. Oliver Corp., 205 F. 2d 376, 8 C. A. (1953); Sec. 187(b), Title 29 USCA; United Brick Workers v. Deena, Supra; International, etc. v. Hawaiian Pineapple, 226 F. 2d 880.

VIII.

Humko has incurred injury in its business and is entitled to recover damages sustained in the amount of $57,013.05, of the defendants Local 984 and the International

IX.

O. R. Phillipy & Sons Company has incurred injury in its business and is entitled to recover damages in the amount of $11,264.73, of the defendants, Local 984, R. A. Farrell, its President, the International and Francis J. Murtha, its Field Representative.

X.

Kuhne has incurred injury in its business and is entitled to recover damages in the amount of $29,358.52, of the defendants, Local 984, R. A. Farrell, its President, the International and Francis J. Murtha, its Field Representative.

ORDER FOR JUDGMENT

Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be entered within five days.

/s/ Marion S. Boyd
United States District Judge

APPENDIX E

ADDITIONAL STATUTORY PROVISIONS

In addition to the statutory provisions quoted pages A32-A33, supra (Contained in Court of Appeals' Opinion), the following provisions of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C.A. §§151 et seq. are also involved in this case:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

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FILED

No. 959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1958

LOCAL UNION 494, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., et al.,

Petitioners,

vs.

THE KUM-BACK COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLEY, and KUHNS-STUDEBAKER COMPANY, INC., et al.,

Respondents.

PETITION OF KUHNS-STUDEBAKER COMPANY, INC. TO THE SUPREME COURT FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Printed at Journal Publishing Co., Champaign, Ill.

No. 950

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1960

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., et al.,

Petitioners,

vs.

THE HUM KO COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLIPY, and KUHNE-SIMMONS COMPANY, INC., et al.,

Respondents.

RESPONSE OF KUHNE-SIMMONS COMPANY, INC., TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

QUESTIONS PRESENTED

Question One

May a Union, while in a labor dispute with an employer, picket the construction of a new plant being built by the employer but in possession of the contractor 400 miles from the employer's plant, when the Union did not represent any of the employees at the construction site and was not engaged in any labor dispute with the contractor?

Question Two

Where picketing is conducted for an unlawful objective and results in a complete shutdown of construction, are the following damage claims recoverable under §303 (b) of the L.M.R. Act:

(a) The reasonable rental value of the contractor's machinery idled, based upon the usual and customary charges made and paid for such machines in the community where the construction was being done.

(b) Wages paid by the contractor for keeping his work force intact through the work stoppage.

(c) Costs incurred in resuming construction.

(d) The contractor's general overhead and administrative expenses attributable to the construction job during the work stoppage.

(e) The damages suffered by the general contractors and sub-contractors as a result of the work stoppage.

STATEMENT

The Secondary Boycott

HumKo owned and operated a plant on Thomas Street, Memphis, Tennessee, for manufacturing edible fats and oils. Local 984 was the certified bargaining agent for the production employees at this plant. (App. 207, 223.)[1]

HumKo also owned and operated a chemical plant on Pope Street, Memphis. Local 984 did not represent the employees of this plant. (App. 293, 296, 297.)

Kuhne-Simmons Company, Inc., a general contractor, of Champaign, Illinois, was engaged by HumKo to construct a plant for it at Champaign, Illinois, to be known as The Midwest Refinery. (App. 315.) Champaign is 400 miles north of Memphis.

Local 984 for a long time had been embroiled in a labor dispute with HumKo at its Thomas Street plant. This dispute had reached an impassé. (App. 207, 208.)

Kuhne-Simmons Company, Inc., had the plant in Champaign about 65%-70% completed (App. 69, 70, 298), had not turned over possession of the plant to HumKo and no production by HumKo was in process when the work stoppage took place. (App. 192, 193.)

Neither Kuhne-Simmons Company, Inc., nor any of the sub-contractors at the construction site, at any time had any labor dispute with either petitioner or any other union. (App. 60, 85, 107, 317.)

Local 984 sent some of its members to Champaign, Illinois, placed a picket line at the only gate at the construc-

1. Page references are to pages in Joint Appendix filed in the Circuit Court of Appeals.

tion site and this picket line effected a complete shutdown of construction for 12 days. (App. 146, 147.)

Local 984 did not represent and had not requested representation of any HumKo employees at Champaign, Illinois (App. 193, 297.) In fact, one of the pickets testified "we were all aware of the fact that there wasn't any employees up there (at Champaign) except contractors and management." (App. 152.)

The avowed purpose of the picket line at Champaign, Illinois, was to stop construction (App. 124, 131, 135, 137, 138, 142, 143, 146, 147, 159, 168, 169, 170, 171, 177). An official of Local 984 in control of the picket line stated to the pickets he "was happy that all construction work was stopped and we had accomplished what we had come for." (App. 152, 170.) This was never denied by either petitioner.

In addition, without objection by petitioners, it was proved (App. 115-116, 118) that a National representative of the International Teamsters Union, a Mr. Mesner or Mesgner, appeared at the Teamsters' picket line in Champaign and "told the fellows to keep on that gate and keep walking," and then on cross-examination of this witness, the International Teamsters Union secured the information that this representative of the International Teamsters Union stated: "He said he was from the International Union and he wanted them (the pickets) to stay on that gate" (App. 118), and this witness, who was a guard at the gate to the premises where the plant was being constructed, "saw him two or three times during the strike" (App. 122). There is no evidence in this case denying these facts, or any showing this International Representative was not all he stated he was. Certainly, this evidence standing alone unexplained and not denied is sufficient to enmesh the International in the secondary boycott.

We respectfully submit *United Brick & Clay Workers v. Deena Artware*, 198 F. 2d 637; Cert. den. 344 U.S. 897, rehearing denied 344 U.S. 919, is decisive of this case. The factual situation in the *Deena* case is not nearly as strong as our facts outlined above constituting a secondary boycott.

This Court has said:

> "These findings are supported by evidence which permits, at most, conflicting inferences and are, therefore, conclusive here." *Helvering v. Lazarous*, 308 U.S. 252, 255.

DAMAGES

Kuhne-Simmons Company, Inc.'s claims for damages are set out in detail at App. 653 through 665.

Charges for equipment idled were based on the going rates in the community where the plant was being built. (App. 344.) No evidence to refute these charges was presented. *Denver Building and Construction Trades Council v. Shore*, 287 P. 2d 267, held this to be a proper element of damages.

Charges for fixed overhead charges, general administrative expense, maintenance, insurance, taxes and necessary personnel retained through the strike (Sch. 2-1, App. 659) were held to be proper elements of damage in *United Electrical, Radio & Machine Workers of America v. Oliver Corp.*, 205 F. 2d 376. No evidence showing these claims were unreasonable was presented.

Petitioners made no contention the cost to the contractor to resume construction was improper.

Attorney fees as damages were allowed in *International Longshoremen's Union v. Juneau Spruce Corp.*, 189 F. 2d 177, affirmed 342 U.S. 237.

CONCLUSION

The respondent, Kuhne-Simmons Company, Inc., prays the petition for writs of certiorari be denied.

Respectfully submitted,

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